United States Court of Appeals

for the Second Circuit

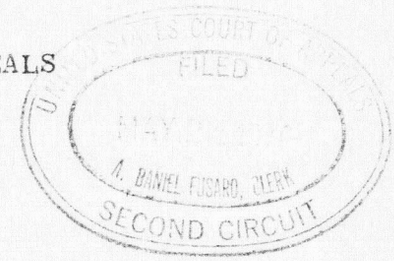
BRIEF FOR APPELLANT

76-7004

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit



JUNIA E. RAAB,

Plaintiff-Appellant

-vs-

TABER INSTRUMENT CORPORATION, a New York Corporation, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of Ralph F. Taber, Deceased

Defendants-Appellees

Docket No. 76-7004
Docket No. 76-7130

BRIEF FOR PLAINTIFF-APPELLANT

Appeals from Judgment of Dismissal entered November 25, 1975, in the United States District Court for the Western District of New York, and from the Decision and Order, dated March 9, 1976, of the same Court.

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff-Appellant
Office and P. O. Address
1202 Marine Trust Building
237 Main Street
Buffalo, New York 14203

TABLE OF CONTENTS

Table of Cases.

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-7004
Docket No. 76-7130

JUNIA E. RAAB,

Plaintiff-Appellant

-vs-

TABER INSTRUMENT CORPORATION, a New York Corporation, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of Ralph F. Taber, Deceased

Defendants-Appellees

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES INVOLVED

1. Whether dismissal of the action for failure of prosecution under Rule 41(b) F.R.C.P. was an abuse of the District Judge's discretion, where counsel for all parties had stipulated in open court to defer trial of the action in order to allow a companion case to go forward; the court

itself had so directed; the companion case had thereafter been settled; the principal defendants' counsel had thereafter moved for and been granted an extension of time to take additional discovery, over the objection of plaintiff's counsel; no additional discovery was in fact taken by said principal defendants' counsel; and the motion to dismiss was made on the last day of the additional time which the Court had granted for the taking of such additional discovery.

2. Whether the District Judge abused discretion in dismissing the action for failure of prosecution upon the basis of facts found by him without a hearing, which were controverted by the plaintiff's affidavits and by matters of record.

3. Whether the dismissal of the action upon findings of controverted facts without affording plaintiff a hearing constituted a deprivation of due process.

4. Whether the denial of plaintiff's motion under Rule 60(b) F.R.C.P. for relief from the judgment of dismissal was an abuse of discretion, where plaintiff called to the Court's attention matters of record conclusively refuting the essential findings of fact upon which the decision

of dismissal was based.

5. Whether the District Judge abused discretion in denying the plaintiff's motion under Rule 60(b), upon findings of fact, and conclusions therefrom, which had been controverted by plaintiff's affidavits, and such findings were made by the District Judge without a hearing.

6. Whether the denial of plaintiff's motion under Rule 60(b), upon findings of controverted facts, without affording plaintiff a hearing, constituted a deprivation of due process.

STATEMENT OF THE CASE

THE NATURE OF THE CASE:

Plaintiff-appellant, Junia Raab ("Raab") is a former employee and shareholder of defendant-appellee Taber Instrument Corporation ("TIC"). On June 3, 1966, TIC purchased from Raab all of his shares in TIC, consisting of 600 shares, at the price of $8.00 per share, or $4,800.00. Raab's cause of action arises under the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, based upon the failure of the defendants to disclose to him at the time of the purchase of his shares that serious negctiations were then underway for the

acquisition of TIC by Teledyne, Inc. at a price equivalent to about $50.00 per TIC share, which acquisition was in fact thereafter consummated at said price on December 30, 1966.

Raab brought timely action in May, 1967, for recission of the purchase of his stock, alleging in his complaint that had he been informed of the Teledyne negotiations, he would not have sold his shares for the price received. (Raab Complaint, A. 13*). As alleged in the complaint, the defendants and their status at the time of purchase of Raab's stock were Ralph F. Taber, the president, principal shareholder, and a director of TIC; Joseph P. D'Angelo (also known as Frank Weber), agent and negotiator for TIC in the Teledyne acquisition ; Benjamin Manasen, a director of TIC; Warren J. Hildebrandt, a director of TIC and its Secretary.

In their respective answers the defendants denied the material allegations of the complaint and interposed by way of affirmative defense, allegations that the purchase of Raab's stock for $8.00 per share was part of an overall settlement whereby a pending suit by him against TIC and the Trustees of its employees Profit Sharing Retirement Plan was

---

* When used herein, "A" refers to page numbers of the Appendix.

discontinued and he was paid the sum of $22,407.88 demanded therein. (Answers of TIC, et al, A. 22; D'Angelo, A. 30).

Raab's action was a companion case to an action in the Western District of New York by another former stockholder and employee of TIC, Joseph F. Less ("Less"), against the same defendants (and one additional defendant, Ervin Himmelfarb) arising from the purchase from Less of 14,000 shares of TIC on May 4, 1966, for $10.00 per share. In that action, Less vs. Taber Instrument Corp. et al, Civil No. 1967-182, Less also sought rescission of the purchase of his stock by TIC, on the ground that he would not have sold his stock for the price he received had he been told of the Teledyne negotiations. (Less Complaint, A. ~~546~~ 560).

In their answers in the Less action, just as they did in the Raab action, the defendants alleged by way of affirmative defense that the purchase of the stock was part of an overall settlement of previously pending litigation between Less and TIC, and that Less received other consideration, in the form of payment of profit sharing moneys of some $22,000.00 sought from TIC and the Trustees of its Retirement Plan, and discontinuance of certain other litigation by TIC against Less

and others (Answers in Less of TIC et al, A. 571; D'Angelo, A. 588; Himmelfarb, R. 170*).

All parties were represented by same counsel in both actions, except that Himmelfarb was represented in Less by separate counsel, Harold Boreanaz.

There were other similarities in the two actions which will be reviewed later in this brief.

THE COURSE OF PROCEEDINGS OF THIS ACTION AND ITS DISPOSITION IN THE DISTRICT COURT

Following completion of extensive discovery, ending with the taking of additional depositions in the Less action by the defendants on October 21, 1972, the two actions were announced as ready by counsel for all parties at a joint pretrial conference held on February 7, 1973, before U. S. Magistrate Edmund F. Maxwell and pretrial statements were filed in both cases (Pretrial Statement of Plaintiffs Less and Raab, A. 101 ; Pretrial Statement of TIC, et al, A. 113).

At the pretrial conference on February 7, 1973 settlement discussions were had with respect to both cases . Plaintiffs' counsel made a demand of $1,250,000. for settle-

* When used herein, "R" refers to document numbers, as listed in the Supplemental and Revised Index to Record on Appeal, of documents not reproduced in the Appendix.

ment of the Less case, and proposed that the much smaller Raab case should be settled on a proportionate basis. Mr. McDonough, representing all defendants in both actions except D'Angelo and Himmelfarb, said that he felt his clients would not be willing to offer Less more than their share of a certain escrow fund established against the possibility of a claim by him, and counsel for the other defendants stated the same position. With respect to Raab, Mr. McDonough stated that it appeared there would be no difficulty settling the Raab case once the Less case were resolved, and plaintiffs' counsel said they agreed (Affidavit of David L. Sweet in Opposition to Motion to Dismiss, A. 243, at 254-255; Supplemental affidavit of James P. Heffernan, A. 341, at 342).

At the conclusion of the February 7, 1973, conference, the Magistrate marked both cases ready for trial and referred them to the court for the scheduling of a trial date (Affidavit of D. Sweet, A. 243, at 255).

Subsequently a joint trial conference in both the Less and Raab actions was held before the District Judge on March 13, 1973. It was reported at that time that Ralph F. Taber had died on February 16th, 1973, and that probate of his will was being handled by the Phillips, Lytle law

firm, which also represented D'Angelo. Pretrial proceedings in both actions were thereupon adjourned by the Court, pending the appointment of the representatives of the Taber estate and their substitution in the two actions, and determination of the question of who their counsel would be (Affidavit of David L. Sweet, A. 243, at 255-266).

After the March, 1973, conference, plaintiffs' counsel, David Sweet, checked from time to time with William Bain, a member of the Phillips, Lytle firm, regarding status of probate of the Ralph Taber will, and was informed on July 5, 1973, that letters testamentary had been issued on July 3, 1973, and also that the Falk, Siemer law firm was then being consulted about acting as trial counsel for the Taber estate in both the Less and Raab actions. (Affidavit of David Sweet in Opposition to Motion to Dismiss, A. 243, at 256-257; Supplemental Affidavit of D. Sweet in Support of Motion Under Rule 60(b), A. 529, at 533, and Exhibit "C" thereto, A. 545).

Upon motion by plaintiffs, the Executors of the estate of Ralph F. Taber were substituted as party defendants in both cases by order granted September 11,1973.

On January 14, 1974, the court issued notices of a meeting for status report in both cases on February 7,

1974 (Raab, A. 118; Less,A. 653). Prior to the conference, plaintiffs' counsel David Sweet called Edward Siemer in an effort to ascertain whether Mr. Siemer was going to replace Mr. McDonough in the litigation, and was told Mr. Siemer had determined that Mr. McDonough should not act as trial counsel, but that he had not yet so advised Mr. McDonough (Affidavit of D. Sweet, A. 243, at 257-258).

At the report conference on February 7, 1974, plaintiffs' counsel informed the court that despite numerous inquiries he had been unable to learn definitely whether Mr. McDonough was to be replaced as trial counsel by Mr. Siemer. Mr. McDonough thereupon announced that Mr. Siemer would replace him as counsel for the Estate of Ralph Taber, but that Mr. McDonough intended to remain as trial counsel for TIC, Manasen and Hildebrandt. The court then scheduled another conference in both cases for February 22, 1974, which was subsequently cancelled by the court .

The Siemer firm was formally substituted as counsel for the estate of Ralph Taber in the Less case on about February 21, 1974, and in the Raab case on about March 8, 1974.

On February 14, 1974, plaintiffs' counsel

served formal notice of motion for consolidation or joint trial of the two cases on the basis that they involved common issues of fact and law (A. 119). In response to plaintiffs' motion for consolidation, counsel for the defendants submitted opposing affidavits, and the Falk, Siemer firm submitted an extensive Memorandum of Points and Authorities in opposition (A.138).

In view of the strenuous opposition of the defendants to the motion for consolidation, and to avoid any delay which its determination might have entailed, plaintiffs' counsel elected to withdraw the motion, and wrote a letter to the Court and opposing counsel to that effect dated March 20, 1974. Also in that letter, plaintiffs' counsel requested that the Less case be tried first with the Raab case to follow, referring to the previous indication by opposing counsel that the Less case should be resolved first, whereupon the Raab case could then be readily settled (A. 135).

On April 29, 1974, a meeting was held between the court and counsel. Mr. Sweet and his trial counsel, David Montgomery, attended, and asked for an early trial. Mr. McDonough attended as counsel for TIC, Hildebrandt and Manasen. The court ruled that he could not act as trial counsel because

of his status as a witness, and directed that substitute trial counsel be obtained as soon as possible, and scheduled another meeting for June 3, 1974, for the setting of a trial date (A. 163).

On June 3, 1974, it was announced that Arnold Zelman was new counsel for Manasen and Victor Fuzak new counsel for Hildebrandt, but that new counsel for TIC had not yet been retained. All counsel agreed that the Less and Raab cases be tried separately, that the Less case be tried first, and the Raab case deferred until after disposition of the Less case. Plaintiff requested an early trial date,and the Falk, Siemer firm said they could not proceed before October 1974.

In an order dated June 14, 1974 the court confirmed the agreement of counsel with respect to deferral of the Raab case until after the Less trial, scheduled the Less case for trial on October 15, 1974, and adjourned the matter of representation of TIC (A. 164).

By order dated July 24, 1974 the court appointed Edward Carland, a member of the Siemer firm, as receiver for TIC, and the Falk, Siemer firm thereupon officially became counsel for TIC, as well as for the estate of Ralph Taber.

Thereafter the parties prepared for trial and from time to time engaged in further settlement negotiations.

Charles McDonough was subsequently taken ill, and he died on August 16, 1974.

As the trial date of October 15, 1974, approached the defendants requested and were granted, over the plaintiffs' objection, postponement of the trial until November 5, 1974. On the eve of trial a settlement in the amount of $560,000. was agreed upon, which was then stipulated to in open court on November 5, 1974. That settlement was thereafter concluded by payment of said amount of $560,000. to Less , and an order of dismissal on settlement entered on December 3, 1974 (A. 666).

Negotiations then took place in December 1974 and January 1975 between plaintiff's counsel David Sweet, and Edward Siemer, attorney for the principal defendants, regarding settlement of the Raab case . These negotiations were unsuccessful and Mr. Sweet so reported to the court, which then scheduled a pretrial conference on March 19, 1975.

At the conference on March 19, 1975, Deanne Siemer, counsel for the principal defendants, stated that the defendants were not ready for trial, and that additional discovery was required. Over the objection of counsel for

plaintiff, the court granted the defendants permission to commence additional discovery by service of interrogatories within 30 days (Transcript, March 19, 1975 Proceedings, A.394). Subsequently the court issued an order extending the time for the defendants to serve such interrogatories to May 1, 1975, and directing completion of all additional discovery by the defendants by August 1, 1975 (Order, May 1, 1975, A. 184).

As the basis for her request for additional time for discovery, Miss Siemer said, at the March 19, 1975, meeting :

> "Well, there is a matter before trial your Honor, and that is as I have said all along I am not satisfied with the discovery in this case. This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this case. It is not adequate with respect to our client. I would expect some additional substantial discovery if this case is going to be trial (sic)"
>
> (Transcript, A. 177).

In granting said request, over the objection of plaintiff's counsel, who pointed out that all discovery had been completed during the period Miss Siemer's clients were represented by Mr. McDonough, the court said :

> " Here is the problem the way I look at it. If we go to trial without discovery then what we are going to do is we are going to have a lot of thrashing around and it will take, - who knows, - it certainly will take extra time to try without having discovery. The other thing is this, the present counsel got in the case at a late date, certainly, and also in this case everyone agreed that this case should follow along after the Less case."
>
> (Transcript, A. 178)

In fact no additional discovery was undertaken by the Siemer firm, and instead, at the very end of the time granted by the court at their request for the taking of such additional discovery, they made a motion to dismiss for failure of prosecution, claiming that in the interim they had suddenly discovered themselves hopelessly prejudiced

by the loss of Ralph Taber, who had died more than two years earlier, and of Charles McDonough, who had died more than eight months earlier (Motion to dismiss, A. 187; Affidavit of Deanne Siemer, A. 227).

After receipt of opposing affidavits and briefs, and oral argument, but without conducting a hearing, the District Judge granted the defendants' motion to dismiss, in a decision dated November 25, 1975 (A. 353) and judgment of dismissal was entered the same date (A. 373).

On December 17, 1975, plaintiff served and filed a notice of motion and affidavits under Rule 60(b) F.R.C.P. for relief from the said judgment of dismissal, asking that said judgment be set aside and the case set down for trial, or that a hearing be afforded plaintiff as to certain controverted matters involved in the Court's decision to dismiss (A. 374).

On December 23, 1975, plaintiff filed a notice of appeal from the said judgment of dismissal (A. 439).

On March 9, 1976, after receiving opposing affidavits and briefs with respect to plaintiff's motion under Rule 60(b) but without affording plaintiff a hearing as to the controverted matters, the District Judge issued a

decision denying plaintiff's motion, for lack of jurisdiction, in view of the docketing of the aforesaid appeal, and stated therein that even if he had jurisdiction he would deny the motion (A. 556).

On March 12, 1976, plaintiff filed a notice of appeal from the denial of the said motion under Rule 60(b) (A. 559).

By order of this Court both of said appeals have been joined for review.

ARGUMENT

POINT I

DISMISSAL OF THE ACTION FOR FAILURE OF PROSECUTION UNDER RULE 41(b) F.R.C.P. WAS AN ABUSE OF THE DISTRICT JUDGE'S DISCRETION, WHERE COUNSEL FOR ALL PARTIES HAD STIPULATED IN OPEN COURT TO DEFER TRIAL OF THE ACTION IN ORDER TO ALLOW A COMPANION CASE TO GO FORWARD; THE COURT ITSELF HAD SO DIRECTED; THE COMPANION CASE HAD THEREAFTER BEEN SETTLED; THE PRINCIPAL DEFENDANTS' COUNSEL HAD THEREAFTER MOVED FOR AND BEEN GRANTED AN EXTENSION OF TIME TO TAKE ADDITIONAL DISCOVERY; NO ADDITIONAL DISCOVERY WAS IN FACT TAKEN BY SAID PRINCIPAL DEFENDANTS' COUNSEL; AND THE MOTION TO DISMISS WAS MADE ON THE LAST DAY OF THE ADDITIONAL TIME WHICH THE COURT HAD GRANTED FOR THE TAKING OF SUCH ADDITIONAL DISCOVERY.

Counsel for all parties agreed at a joint pre-trial meeting in the Less and Raab cases on June 3, 1974, that Less be tried first and that the trial of Raab be deferred until after trial of Less. This was confirmed in the order of the court dated June 14, 1974 (A. 164).

At that time the Siemer firm had been involved with the litigation for nearly a full year (Affidavit of D. Sweet, A. 243, at 256-257).

Well before entering into that agreement the Siemer firm had shown themselves to be thoroughly familiar with every aspect of the entire litigation in both actions, and all discovery which had been taken, by their extensive and minutely detailed "Memorandum of Points and Authorities of Defendant Estate of Ralph F. Taber in Opposition to Motion to Consolidate" dated March 22, 1974 (A. 138-160).

The defendants' alleged justification for making a motion to dismiss so belatedly, and in spite of their aforesaid agreement of nearly 11 months earlier, to defer Raab until after Less, was that they found themselves unable to proceed to trial without the testimony of Ralph Taber and Charles McDonough (Affidavit of D. Siemer, A. 227). They contended that the extensive depositions of Mr. Taber and Mr. McDonough, transcripts of which were available for use on trial, were inadequately taken. However, they described Mr. McDonough, who had personally represented their clients in all of said proceedings, as " a distinguished and able practitioner" (D. Siemer Affidavit, A. 227 at 231).

Mr. Taber had been dead for more than two years before the aforesaid June 3, 1974 agreement of counsel, and more than three years before the motion to dismiss was served. In addition he had been examined extensively regarding the matters common to both the Less and Raab actions, i.e., the Teledyne negotiations, the acquisition of TIC and its liquidation. His testimony covers 320 pages, with over 40 exhibits (Transcripts R. 62, 63, 64).

Mr. Taber did not directly participate in the negotiations for the purchase of Raab's stock, which were handled personally and exclusively by Mr. McDonough (Transcript of McDonough deposition, 7-13-70, A. 53).

Mr. McDonough was deposed fully and in detail regarding the Teledyne-TIC transaction, the liquidation of TIC and his negotiations for the purchase of both the Less and the Raab stock. It is true, as defendants have alleged, that Mr. McDonough refused to answer on the ground of privilege certain questions asked him by plaintiffs' counsel regarding the nature and extent of any evidence of misconduct on the part of Raab in regard to his suit for profit sharing moneys, (matters not directly pertinent to the issue in this case.) However, that was a matter of deliberate strategy

adopted by Mr. McDonough, an able and experienced trial attorney, and the defendants should not now be heard to complain through new counsel, and with hindsight, that said strategy has not worked out to their wishes.

In addition defendants' claim of prejudice through loss of the live testimony of Mr. McDonough is palpably without merit. He testified that he alone conducted the negotiations for purchase of the Raab stock with Raab's then attorney, Franklin Ness, and that the transaction was part of an overall settlement whereby Raab also received his disputed profit sharing moneys. His testimony therefore supports the defendants' position that Raab received more than just the stated price of $8.00 per share, and Mr. Ness is no longer available to refute that testimony. Mr. McDonough also testified that he had personal knowledge of the Teledyne negotiations for TIC at the time of his own negotiations with Mr. Ness for the Raab stock, and that he did not inform Mr. Ness of the Teledyne negotiations. (McDonough, Transcript, A. 53). Thus McDonough testified fully as to the facts within his personal knowledge concerning the matters pertinent to the issues of this action, i.e., whether Raab is entitled to rescission of the

sale of his stock by virtue of nondisclosure of a material fact, the Teledyne negotiations.

In any event the Siemer firm had ample opportunity, had they seen fit to do so, to take an additional deposition of Mr. McDonough on any issues as to which they felt the existing depositions were insufficient.

It is noteworthy that Mr. McDonough was to be a witness in the Less case as well as in Raab . However after Mr. McDonough's death in August, 1974, preparations for trial of Less proceeded without interruption, and no motion to dismiss was made or threatened by the defendants. There is no apparent difference in that circumstance in the Raab case, except that the defendants have reason to consider his case stronger than that of Less, because it is not contended that anyone informed Raab of the Teledyne negotiations, whereas D'Angelo had testified that he did so inform Less.

In connection with the foregoing points, and others covered in this brief, the Court's attention is respectfully directed to the affidavits submitted by plaintiff in opposition to the defendants' motion to dismiss(A. 243; A, 287; A. 330; A. 341) and in support of the plaintiff's motion for relief from the judgment of dismissal (A.376;

A. 429; A. 437) wherein facts pertinent to the issues on these appeals are more fully set forth than it is practicable to do in this brief.

The defendants have also contended that their motion to dismiss was justified by lack of sufficient activity on the part of plaintiff Raab, as measured alone and without regard to activity in Less. However, as the record shows, and as plaintiff's affidavits above referred to point out in detail, Less and Raab were companion cases, and were always so regarded. Both Less and Raab sued for rescission of the purchases of their stock by TIC, claiming that had they been informed of the Teledyne negotiations for acquisition of TIC at a proposed price of $50. per TIC share they would have retained their shares, and would have therefore, on liquidation have been entitled to participate in the distribution of Teledyne shares then worth approximately $100. per TIC share made to TIC shareholders in May, 1967, on liquidation of TIC. Both cases arose out of similar circumstances and within approximately the same period of time. In view of the disparity in the magnitude of the claims, counsel for all parties consistently treated Less as the lead case, with the understanding that the basic common discovery was being taken in the Less

case. At calendar calls and pretrial conferences the two cases were consistently answered and dealt with as companion cases, with the full consent of counsel for defendants. The court always scheduled pretrial conferences for both actions simultaneously and often by jointly captioned notices, as in the joint notice of pretrial conference on March 13, 1973 (A. 117).

The pretrial statements of plaintiffs and defendants TIC et al and D'Angelo were all joint statements for both Less and Raab, and jointly captioned (A.101; A. 113; R. 148)

Counsel for the defendants confirmed at the meetings before the Magistrate on February 7, 1973, that they felt Less should be resolved first, with the expectation that Raab could then be disposed of along the same lines (Affidavit of D. Sweet A. 243, at 254-255; Affidavit of J. Heffernan A. 341-342; Affidavit of D. Sweet A. 376, at 382-~~383~~384) .

That understanding was acknowledged and confirmed by defendants' counsel in the court proceedings on March 19, 1975 (A. 394, at 402).

In view of the foregoing facts and circumstances alone, the decision of the court on November 25, 1975 in grant-

ing the defendants' last minute motion to dismiss is a shocking injustice and a clear abuse of discretion.

The court's decision is based upon statements of fact which are in direct conflict with matters of record, as well as being controverted by the affidavits and exhibits submitted upon behalf of plaintiff. Among such serious errors are the following :

In the last paragraph on page 4, and again on page 5, the decision says that the record in the Raab case must be considered standing alone, for purposes of the defendants' motion. As is clear from the record, that statement is unfounded.

It is directly contradictory, for example, to the court's own statement at the proceeding on March 19, 1975, wherein the court said :

> " * * * in this case everyone agreed that this case should follow along after the Less case " .
>
> (March 19, 1975, Transcript, A. 394 at 403).

At that same proceeding, the court had expressed its approval of said agreement of counsel, saying, in regard to the defendants' request for additional discovery :

" That is fine, but the thing is that I believe that because of all the things I said befpre, late time of counsel getting in, you know, as far as everybody's attention, and I think from a practical matter it should have been focused on the other case because there we were talking about a million dollars and this case is certainly a very, very small one so I think that even though late discovery ought to go ahead. When, how long will it take to do this? " (Emphasis added)

(March 19, 1975, Transcript, at A. 406)

The conclusion is stated at page 5 of the decision that the evidence as to the negotiations between Less and TIC would not be relevant to Raab . In fact the sudden interest and activity of the TIC insiders in buying Less' stock is a strong indication that the Teledyne negotiations had become important by the spring of 1966, when both the Less stock and Raab stock was purchased by TIC. Thus that evidence would bear directly on the central issue of the Raab action and would serve to refute the defense asserted by the defendants that the Teledyne negotiations were not of suf-

ficient importance to warrant their disclosure to Raab, nor material to his decision to sell his stock.

The statement at page 5 of the decision concerning the appearance of Raab on the dismissal calendar in February 1970, misstates the actual facts and circumstances. The case appeared there routinely under local rule 11, since the court's docket reflected no activity for one year. Plaintiff's counsel appeared at the call of that calendar on March 13, 1970, and informed the court that Raab was a companion case to Less, in which discovery was going on affecting both cases. The court thereupon had the case placed on the adjourned dismissal calendar for status report on June 12, 1970. On that date plaintiffs' counsel confirmed to the court by letter that Less and Raab were companion cases, and reported on the discovery in progress, and the case was routinely removed from the dismissal calendar (Notice under local Rule 11, A. 43; Letter from James Heffernan to Court, A. 50; Adjourned Dismissal Cal., A. 52).

The statements at page 6 of the decision indicating that plaintiff disobeyed an order of the court requiring the filing of a pretrial statement are clearly unfair

from the record. The pro forma order which accompanied the joint notice of pretrial conference for April 2, 1971 was directed to all parties, not just the plaintiffs. None of the parties filed a pretrial statement, because discovery was incomplete as was reported to the court at the conference.

With respect to the many other incorrect statements contained in the decision of November 25, 1975, to avoid burdening this brief, this Court's attention is again especially directed to the affidavits and exhibits submitted upon behalf of plaintiff in opposition to the motion to dismiss and in support of the motion to have the judgment of dismissal set aside.

In summary, the decision of dismissal entirely overlooks or discounts the significance of the relationship between the Less and Raab actions, the record agreement of counsel to defer Raab until after disposition of Less, the fact that Less was in fact thereafter settled, the fact that all parties assumed the risk of loss of all or any of their live witnesses in Raab by reason of their agreement to defer that case pending the disposition of Less , in the mutual expectation that Raab could then be readily settled.

The court's decision also overlooked the fact that following the filing by plaintiffs of notes of issue in both Less and Raab in October 1971, the plaintiffs announced themselves ready for trial in both cases, at every calendar call and pretrial conference thereafter, and that no ensuing delays in proceeding to trial were attributable to the plaintiffs. (Affidavit of D. Sweet, A. ~~334~~ 330; Affidavit of James Heffernan, A. 341).

Despite the statements in the court's decision to the contrary the defendants never declared themselves ready for trial in either Less or Raab until the February 7, 1973, pretrial conference before the Magistrate, having taken additional discovery in October, 1972.

The delay of the defendants in securing substitute counsel and preparing for trial following the March, 1973, pretrial are unaccountably glossed over in the court's decision, but if they had acted with reasonable diligence both Less and Raab could have been tried and disposed of well before the death of Mr. McDonough in August, 1974.

The statement in the decision that the court "on numerous occasions" warned plaintiffs of possible dismissal for failure to prepare is unsupported in the record, and in

addition is categorically denied by plaintiff's counsel David Sweet and James Heffernan in their affidavits.

Both cases were under the continuing supervision of the court, and progressed simultaneously until the agreement of counsel in June, 1974, and confirming order of the court, whereby Less proceeded to trial and Raab was deferred. Therefore under those undisputed circumstances, it was clearly improper and unjust to dismiss Raab in November 1975 because of alleged delays in both Less and Raab said to have taken place several years before.

In addition to overlooking or misconstruing important matters of record bearing on the defendants' motion, the court overlooked the rule of law that in such a case, where no hearing is held, the statements of the affidavits submitted by plaintiff, and the reasonable inferences therefrom must be considered as true.

U.S. vs. Herold, 368 F. 2d 187
(2nd Cir. 1966)

The harsh sanction of dismissal should be resorted to only in extreme cases, and it was a clear abuse of discretion under the circumstances established by the record in this case.

Meeker v. Rizley, 324 F. 2d 269
(10th Cir. 1963)

Syracuse Broadcasting Corp. vs. Newhouse,
271 F. 2d 910 (2nd Cir. 1959)

Lyford v. Carter, 274 F. 2d 815, (2nd Cir. 1960).

Bendix Aviation Corp. vs. Glass
176 Fed. Supp. 374

Timmerman Products Inc. v. Garrett
22 F.R.D. 56

Rankin v. Shayne Bros. Inc.
280 F. 2d 55

International Harvester Co. vs. Rockwell Spring & Axle Co.
339 Fed. 2d 949

In any event, the defendants' motion to dismiss was untimely.

U.S. v. Myers, 38 F.R.D 194

POINT II

THE DISTRICT JUDGE ABUSED DISCRETION IN DISMISSING THE ACTION FOR FAILURE OF PROSECUTION UPON THE BASIS OF FACTS FOUND BY HIM WITHOUT A HEARING, WHICH WERE CONTROVERTED BY PLAINTIFF'S AFFIDAVITS AND BY MATTERS OF RECORD.

Without a hearing, the court found numerous facts upon which it based its dismissal of the action, even though such matters were controvered by plaintiff's affidavits, and also in many instances by the record. Such findings include :

That the record in Raab must be considered standing alone, without regard to proceedings in Less , when in fact it was a companion case and so regarded by counsel.

That the evidence as to negotiations between Less and TIC would not be relevant to the Raab case;

That the plaintiffs misled the court and counsel by filing premature notes of issue;

That there was no understanding among counsel that depositions taken in Less were also to be used in Raab;

That the court warned counsel for both Raab and Less " on numerous occasions" of possible dismissal;

That the plaintiffs Raab and Less disobeyed an order of the court requiring filing of a pretrial statement;

That a pretrial conference before the Magistrate on August 17, 1972 had to be adjourned because of failure of plaintiffs Less and Raab to file a pretrial statement;

That plaintiffs took no action from September 1973 until 1974 to advance the two cases for trial;

That in the Raab case the defendants had always asserted their readiness for trial;

That the defendants never delayed proceedings before the court.

It was a clear abuse of discretion, and entirely unfair to make such findings in the face of the record and over the affidavits and exhibits of the plaintiff to the contrary.

As pointed out above, for purposes of determining such a motion to dismiss and where there is afforded no hearing the affidavits of the plaintiff as to controverted matters must be regarded as true.

U. S. v. Herold, supra .

In any event, it was improper to decide such matters against the plaintiff without affording him a hearing.

Anderson National Bank v. Luckett
321 U. S. 233, 64 S. Ct. 599, 88 L.Ed.692.

POINT III

DISMISSAL OF THE ACTION UPON FINDINGS OF CONTROVERTED FACTS WITHOUT AFFORDING PLAINTIFF A HEARING CONSTITUTED A DEPRIVATION OF DUE PROCESS.

" * * * the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked".

Anderson National Bank vs. Luckett,
321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692

Under the circumstances here involved, it was a deprivation to dismiss plaintiff's action without a hearing as to the controverted matters involved in the determination of the motion.

POINT IV

THE DENIAL OF PLAINTIFF'S MOTION UNDER RULE 60 (b) F.R.C.P. FOR RELIEF FROM THE JUDGMENT OF DISMISSAL WAS AN ABUSE OF DISCRETION WHERE PLAINTIFF CALLED TO THE COURT'S ATTENTION MATTERS OF RECORD CONCLUSIVELY REFUTING THE ESSENTIAL FINDINGS OF FACT UPON WHICH THE DECISION OF DISMISSAL WAS MADE.

In the affidavits and exhibits submitted in support of the motion under Rule 60(b) to set aside the judgment, plaintiff pointed out to the court matters of record showing that Less and Raab had always been regarded and handled as companion cases, by all counsel and by the court itself, and that Less had always been treated as the lead case, by agreement of counsel and the court. Among other things plaintiff directed the court's attention to the acknowledgement and confirmation of that understanding by defendants' counsel and the court at the March 19, 1975 proceedings.

Under the circumstances the court should have decided said motion in favor of plaintiff, in keeping with the authority given it under Rule 60(b), to correct an injustice.

In this regard, it was not necessary for the court to determine precisely under which clause of Rule 60(b) to afford such relief. 7 Moore's Federal Practice, p. 346.

Also, as is stated in 7 Moore's Federal Practice, p. 375, clause (6) of Rule 60(b) is a "grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief, but the motion is nevertheless, timely and the reason justifies relief."

For purposes of the determination of the Rule 60(b) motion, the affidavits of the plaintiff were required to be regarded as true. U.S. Herold, supra.

POINT V.

THE DISTRICT JUDGE ABUSED DISCRETION IN DENYING THE PLAINTIFF'S MOTION UNDER RULE 60(b) UPON FINDINGS OF FACT AND CONCLUSIONS THEREFROM, WHICH HAD BEEN CONTROVERTED BY PLAINTIFF'S AFFIDAVITS, AND SUCH FINDINGS WERE MADE BY THE DISTRICT JUDGE WIHTOUT A HEARING.

Although plaintiff submits that the court should have decided the Rule 60(b) motion in favor of plaintiff upon the basis of the matters of record called to his attention and the facts as set forth in plaintiff's affidavits, it was in any event an abuse of discretion to deny the motion without affording plaintiff a hearing. For example, plaintiff

referred to a conference with Magistrate Maxwell concerning certain important matters found by the court in its decision of dismissal, and listed the testimony helpful to plaintiff which the Magistrate would give upon a hearing.

The denial of the motion without a hearing was an abuse of discretion.

> Universal Oil Products Co. vs. Root Refining Co. 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447.
>
> Federal Dep. Ins. Corp. v. Alker, 234 F. 2d 113.
>
> Laguna Royalty Co. v. Marsh 350 F. 2d 817.

POINT VI

THE DENIAL OF PLAINTIFF'S MOTION UNDER RULE 60(b) UPON FINDINGS OF CONTROVERTED FACTS, WITHOUT AFFORDING PLAINTIFF A HEARING, CONSTITUTED A DEPRIVATION OF DUE PROCESS.

The denial of the 60(b) motion without affording plaintiff a hearing thereon was not only an abuse of discretion, but so unfair and arbitrary as to constitute a deprivation of due process.

> Anderson National Bank v. Luckett 321 U. S. 233, 64 S. Ct. 599, 88 L.Ed. 692

CONCLUSION

(1) THE JUDGMENT OF DISMISSAL SHOULD BE REVERSED AND THE ACTION RESTORED TO THE TRIAL CALENDAR OF THE U. S. DISTRICT COURT, W.D.N.Y. FOR IMMEDIATE TRIAL; OR IN THE ALTERNATIVE

(2) THE DENIAL BY THE DISTRICT COURT OF PLAINTIFF'S MOTION UNDER RULE 60(b) SHOULD BE REVERSED, AND THE CASE REMANDED TO THE DISTRICT COURT FOR THE GRANTING OF AN ORDER BY THAT COURT, VACATING AND SETTING ASIDE THE JUDGMENT OF DISMISSAL; OR IN THE ALTERNATIVE

(3) THE ACTION SHOULD BE REMANDED TO THE DISTRICT COURT FOR A FULL HEARING OF THE ISSUES PRESENTED BY THE DEFENDANTS' MOTION FOR DISMISSAL AND THE PLAINTIFF'S MOTION FOR RELIEF FROM THE JUDGMENT OF DISMISSAL.

Respectfully submitted,

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff-Appellant
1202 Marine Trust Building
Buffalo, New York 14203

DAVID L. SWEET, Of Counsel

Dated : May 20th, 1976.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUNIA E. RAAB,

Plaintiff-Appellant

-vs-

Docket No. 76-7004
Docket No. 76-7130

TABER INSTRUMENT CORPORATION, et al

Defendants- Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 1976, I served two copies of Plaintiff-Appellant's brief and one copy of the joint appendix on Miss Deanne Siemer, Robert M. Hitchcock, Ross L. Runfola and Victor T. Fuzak, counsel for Defendants-Appellees, by delivering same to their respective offices.

David L. Sweet